> "* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same. * * *"

For our purposes the facts regarding the 1943 contract can be briefly stated. As to the gas price for the second five year period, the parties, in October 1948, first agreed to a price covering the six months from September 1, 1948 to March 1, 1949, providing that at the end of that time they "* * * will negotiate, in accordance with paragraph III b and d, the price to be paid for gas delivered during the remaining four years and six months of the second five year period as provided in the contract." On February 16, 1949, the parties by written contract stated "* * * it is desired by the parties hereto that a new agreement be reached as to the price to be effective during the remainder of the second five year period of the contract." And further said "* * * that for the period beginning March 1, 1949 and ending August 31, 1953, the price of gas shall be five cents (5¢) net per one thousand (1,000) cubic feet of gas received * * *."

With the beginning of the third five years at hand Texas wrote Atlantic saying that "* * * The price provisions * * * expire on August 31, 1953" and "* * * You are hereby notified of our willingness to commence negotiations with you concerning such price * * *." Those negotiations commenced the following month and were concluded by a contract entered into on February 17, 1954. This fixed the gas price of 12.2¢ per Mcf as of September 1, 1953 and extending to August 31, 1958. It is this agreement that petitioner urges triggered the escalation clause of its contract with Texas Gas. At that time petitioner was receiving 8.997¢ per Mcf.

The Presiding Examiner agreed with Shell. Deciding we had jurisdiction to construe Shell's contract, we held that its "favored nation" provision was activated by the February 17, 1954 agreement between Atlantic and Texas Gas. As stated, we assumed without deciding that the

Atlantic-Louisiana 1943 commitment imposed "a binding agreement to agree on the price of gas in each of the contract's last four five year periods." Certiorari was granted on the question of jurisdiction. That point was upheld but the Supreme Court as to the construction of the 1943 agreement (which question was within the scope of the petition for certiorari) concluded that the 1954 Atlantic-Texas Gas contract did not bring into being the escalator provision of the Shell-Texas Gas covenant.

Our primary responsibility on remand is to determine whether with respect to its third five year term, the 1943 contract between Atlantic and Texas Gas was enforceable. The answer to this lies in the pact's arbitration clause. Under that the certainty of arbitration is properly conceded by Shell. Its concession however goes no further. And it argues determinedly and forcefully that the arbitration might never have resulted in an accepted price. If this is so Shell's contention is correct.

We are dealing with a full dress instrument. Its twenty five year continuity is clearly expressed. Its intent to have binding prices for the indicated gas throughout its term is evident. It could have been and should have been tighter in that regard but we do not consider it so loose as to defeat the mandatory establishment of prices under it for all its segments. Purpose of the parties alone is not enough but starting with that, as we must, the 1943 instrument, correctly interpreted, will produce a fixed price for its 1953-1958 portion.

The problem in the first instance is not one of specific performance. No need worrying about that if no price certain is ascertainable. Assuming no price accord between the parties on the period before us either one of them under Condition XII by notice to the other can name an arbitrator. The second party within ten days after that is empowered to select a second arbitrator. Within a second ten days, a third arbitrator, chosen by the first two is provided for. If either party fails to designate an arbitrator, the one chosen "shall arbitrate the question alone." If two arbitrators have been appointed and they do not

agree on a third, the latter "* * * shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application by either of said parties to the arbitration." Condition XII concludes by stating "* * * The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same * * *."

It seems to us that the above language is meaningful. By it the parties accept a definite standard under which the gas price will be established directly within the contract area. The intent is plainly that if arbitration be necessary to arrive at a price the prescribed method will produce the contemplated price. And the mechanics of the stated procedure follow through acceptably to that end. We cannot say that, given the elaborate structure and purpose of this long term agreement, Condition XII can be fairly construed to be so maladroit that its language justifies a reasonable view that the arbitration established by it will so misfunction as to be unable or unwilling to arrive at a price.[4]

Nor can we agree that the flexible pricing arrangement of the contract makes it severable to the degree that it does not come into effect with respect to the periods beyond the first until the actual price for each has been determined. The motivation behind the periodic price adjustments is recognition of the probabilities of normal price variation in gas during the long duration of the contract. The principle makes sense against any contrary view that might be urged. Particularly is it desirable as compared to an attempt to state rigid price figures for the whole future twenty five year operation. It is true that

---

[4] We find no substance to the proposition that because the parties, at the conclusion of the second five year period, directly negotiated between themselves the gas price figure for the third year it would have been too late under the contract for them to have then turned to arbitration. It seems to us that negotiations, even if protracted, are plainly the contract intendment. The arbitration machinery is set up for use should such negotiations prove unsuccessful.

certain standards for the calculation of the interval prices could have been and might well have been named. Absent these there is present the definite procedure and obligation to accede to it by which the needed prices are to be fixed.

Much is said in the case on the question of whether Louisiana law governs enforceability of the contract but under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. Circumstances considered, the Atlantic-Texas Gas agreement does contain a valid, workable price-fixing standard. We would be ignoring this and descend to quibbling were we to hold otherwise.

The order of the Commission will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,568

SHELL OIL COMPANY,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLIE GAS AND ELECTRIC COMPANY,

Intervenors.

PETITION TO REVIEW AND SET ASIDE ORDER OF THE FEDERAL POWER COMMISSION.

Present: GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the Federal Power Commission be, and it is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

June 15, 1961.